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CITATIONS

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Statutes:

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

SAFE HARBOR WATER POWER CORPORATION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above case on December 2, 1941.

OPINIONS BELOW

The opinions of the Federal Power Commission are found at R. Vol. I, pp. 22–46. The opinion of the Circuit Court of Appeals (R. Vol. I, pp. 668–679) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 2, 1941 (R. Vol. I, pp. 679–680). The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Sec. 313 (b) of the Federal Power Act.

QUESTIONS PRESENTED

The question presented is whether the Federal Power Commission has jurisdiction to regulate interstate wholesale rates of a licensed hydroelectric project under Section 20 of Part I of the Federal Power Act irrespective of whether the states concerned have provided a commission or have been unable to agree on such rates. Determination of this question requires an inquiry into—

(1) Whether Section 20 of Part I of the Federal Power Act is a manifestation of congressional consent to the regulation of interstate wholesale rates by the interested states.

(2) If not, whether the jurisdiction of the Federal Commission is made dependent upon the failure of the states to provide a commission or agree on rates even in fields where the states lack constitutional power.[1]

STATUTES INVOLVED

Section 20 of Part I of the Federal Power Act of 1935 (16 U. S. C. sec. 813), formerly Section

[1] In the event that this petition is granted, the Government will urge that the merits of the rate order issued by the Commission should be decided by this Court, and that the rate order is in all respects valid.

20 of the Federal Water Power Act of 1920 (41 Stat. 1073), provides as follows:

> SEC. 20. That when said power [generated by a licensee] or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the

provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or

allowed for the rights granted by the commission or by this Act.

The pertinent portions of Sections 14 and 201 of the Federal Power Act of 1935 (49 Stat. 844, 847, 16 U. S. C. secs. 807, 824) are set forth in Appendix A, *infra,* pp. 20–21.

STATEMENT

The Safe Harbor Water Power Corporation, a Pennsylvania corporation (R. Vol. I, p. 61) owns and operates a large hydroelectric project on the Susquehanna River near Lancaster, Pennsylvania, under a 50-year license issued in 1930 by the Federal Power Commission (R. Vol. I, pp. 22–23; R. Vol. II, p. 6). The only property owned by Safe Harbor is a dam and power plant and the usual related structures (R. Vol. I, pp. 71–72). Under a contract expiring in 1980, Safe Harbor sells its entire output of electric energy at wholesale to its parent companies, the Consolidated Gas Electric Light and Power Company of Baltimore (hereinafter called the Baltimore company) and the Pennsylvania Water and Power Company of Holtwood, Pennsylvania (hereinafter called the Holtwood company). (R. Vol. II, pp. 57–77). The parent companies are entitled to electric energy from Safe Harbor in proportion to their stock ownership in the Safe Harbor Company, the Baltimore company receiving two-thirds and the Holtwood company receiving one-third of Safe Harbor's output (R. Vol. I, pp. 72, 73, 77; R. Vol. II, pp. 60–61.)

The two-thirds of the output to which the Baltimore company is entitled is delivered to it at Baltimore and Takoma Park, Maryland, and is distributed to the consumers principally in Baltimore (R. Vol. I, pp. 73, 77; R. Vol. II, pp. 59–77)[2] The other one-third is delivered at the project site to the Holtwood company (R. Vol. II, p. 70), which transmits and sells most of it at wholesale to the Baltimore company at the Baltimore and Takoma Park delivery points (R. Vol. II, pp. 59–77), and sells the remainder to the Pennsylvania Railroad and to several Pennsylvania distributing companies (R. Vol. I, p. 82). Approximately 90 percent of the product of Safe Harbor is sold at wholesale in interstate commerce (Exh. 18, p. 44).

Section 20 of Part I of the Federal Power Act of 1935, originally enacted as Section 20 of the Federal Water Power Act of 1920, confers jurisdiction upon the Federal Power Commission to regulate the rates charged by the licensees for power entering "interstate commerce" in the event that (a) any interested state fails to provide a commission to regulate such rates, or (b) the constituted state authorities fail to agree as to the licensee's rates, service, or security issues. Section 20 further directs the Commission

[2] The transmission lines over which the energy is delivered to the Baltimore company are owned and operated by the Holtwood company (R. Vol. II, pp. 66–67, 75–76).

to value the licensee's properties on a net investment basis.[3] Part II of the Federal Power Act authorizes the Commission to regulate interstate "wholesale" rates of all electric utilities (secs. 201 (b), 206), but limits the jurisdiction of the Commission "to those matters which are not subject to regulation by the States" (sec. 201 (a)), and does not in terms fix any basis of valuation other than that which the Constitution may be deemed to require (cf. sec. 208).

On November 9, 1937, the Federal Power Commission upon its own motion instituted an investigation to determine whether the rates charged by Safe Harbor to its parents "for or in connection with the transmission or sale of electric

[3] The Public Utility Code of Pennsylvania (Purdon's Penna. Stat. Ann. (1941), Tit. 66, sec. 1532) provides that its provisions shall not be construed to apply to interstate commerce "except in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress."

The Maryland statute (Ann. Code of Md. (1939), Art. 23, sec. 427) provides as follows:

"The provisions of this sub-title shall apply to services or utilities rendered by any of the corporations or persons subject to the provisions hereof, or any of the same, within the State of Maryland, and shall not be so construed as to extend to any matter or thing which, under the Federal Constitution, the Congress of the United States has the exclusive power to regulate, or which the Congress of the United States has, in conformity with said Constitution, and in the exercise of its concurrent power, in fact regulated, to the exclusion of the concurrent power of the several States."

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energy, subject to the jurisdiction of the Commission" were unduly preferential, unreasonable, or otherwise in violation of the provisions of the Federal Power Act (R. Vol. I, pp. 48–50). On July 14, 1939, the Commission ordered a hearing to determine whether the contract mentioned above violated any of the provisions of Parts I and III of the Federal Power Act or any rule of the Commission thereunder, or whether any of Safe Harbor's rates "for the sale of electric energy" to the Baltimore company and the Holtwood company were unjust, unreasonable, or unduly discriminatory, and to determine the just and reasonable rates and fix the same by order (R. Vol. I, pp. 50–51).

Public hearings were held in October and November of 1939, and, on July 11, 1940, the Commission entered an order requiring Safe Harbor to reduce its wholesale rate for electricity approximately $350,000 annually (R. Vol. I, pp. 41–42). The rate base adopted by the Commission was the statutory base of net investment prescribed in Sections 20 and 14 of Part I of the Federal Power Act. The Commission pointed out that although it had "jurisdiction over the rate here by virtue of its authority under Part II of the Federal Power Act, which provides for the regulation of 'the sale of electric energy at wholesale in interstate commerce,' the Commission has asserted its jurisdiction in this case under Part I of the Federal Power Act which applies to licensed projects"

(R. Vol. I, p. 24). The Commission made no finding that the public service commissions of Maryland and Pennsylvania were unable to agree as to the interstate wholesale rates to be charged by the respondent and there is no evidence in the record on this point.

On petition for review (R. Vol. I, pp. 1–21), the Circuit Court of Appeals, without passing upon the merits of the Commission's order, held that the Commission had exceeded its jurisdiction. The court held that Section 20 constitutes congressional consent to the formation of state compacts for cooperative local regulation of interstate rates and conferred jurisdiction on the Commission only in the event that the interested state commissions are unable to agree on the rates to be charged (R. Vol. I, pp. 668–679).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding the Federal Power Commission to be without jurisdiction under Part I of the Federal Power Act to fix interstate wholesale rates for licensed hydroelectric projects in the absence of a finding that the commissions of the interested states had been unable to agree on such rates.

2. In holding that Section 20 of Part I of the Federal Power Act of 1935 gives the consent of Congress to the formation of compacts for cooperative state regulation of interstate wholesale

electric rates charged by a licensee of the Federal Power Commission.

3. In setting aside and failing to enforce the order of the Federal Power Commission.

REASONS FOR GRANTING THE WRIT

1. This case is both novel and important in that it is the first case involving the authority of the Federal Power Commission to fix interstate wholesale electric rates for licensed water power projects under Part I of the Federal Power Act.

This Court has held that the states lack constitutional power to fix interstate wholesale rates (*Missouri* v *Kansas Gas Co.*, 265 U. S. 298; *Public Utilities Commission* v. *Attleboro Co.*, 273 U. S. 83), although interstate retail rates, being regarded as local matters, are subject to state regulation (*Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23; *Public Utilities Commission* v. *Landon*, 249 U. S. 236). The court below held that the Federal Power Act enlarges the authority of the states so that they may regulate both wholesale and retail interstate rates for federally licensed projects.[1] We think, on the

[1] The court below held that the Power Act authorized the State Commissions to agree on interstate rates through compacts. But there is considerable doubt as to whether the State Commissions are vested with such authority. The General Solicitor of the National Association of Railroad and Utilities Commissioners, in commenting upon what he termed the "strange opinion" of the court below, has noted

contrary, that Congress merely refrained from depriving the states of the power over interstate commerce which they already possessed over interstate retail rates. This issue, as applied to the water power projects licensed by the Federal Power Commission, is of obvious public importance.

The question of the proper construction of Section 20 is of importance for the further reason that upon it may depend the basis for valuation of the licensed projects for rate-making purposes. Section 20 read together with Section 14 provides that no value shall be "claimed by the licensee or allowed by the commission" in excess of net investment, a condition of the license of undoubted validity. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 427–428. Under Part II of the Federal Power Act, which applies to all interstate wholesale electric rates, licensed or unlicensed, as well as under state regulation, the utilities invariably contend that the rates must constitutionally be established upon the basis of "fair value," as long as *Smyth* v. *Ames*, 169 U. S. 466, is not overruled. The construction given to Section 20 may thus have an effect upon whether

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that the state commissions, operating under laws providing that rates "must be determined upon evidence offered in due process of law hearings," might have difficulty in fixing rates by compact. See National Association of Railroad and Utilities Commissioners Bulletin, No. 156—1941.

a "definite, stable, and readily ascertainable" (R. Vol. I, p. 39) rate base may be adopted in the regulation of the interstate wholesale rates of licensed projects or whether the "delusive" fair value rule must continue to be applied notwithstanding the "insuperable obstacles" (*ibid.*) which have been encountered thereunder.[5]

The decision below may also affect the scope and operation of Part II of the Act, and thus restrict the Commission's power over all interstate rates. For if the decision below is not set aside, it will undoubtedly be argued by the utilities that the declaration in Section 201 (a) of Part II limiting federal regulation "to those matters which are not subject to regulation by the States" incorporates by reference all authority held to have been vested in the states by Part I as construed by the court below. Moreover, licensed and unlicensed projects are frequently integrated into a single interstate system. In such circumstances the decision below would impair effective regulation, since it would seem to permit state regulation of licensed hydroelectric projects and separate federal regulation of steam plants and non-licensed water power developments.

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[5] See brief for the Federal Power Commission and the Illinois Commerce Commission in *Federal Power Commission and Illinois Commerce Commission* v. *Natural Gas Pipeline Company of America et al.*, Nos. 265 and 268, this Term.

2. Section 20 provides that "whenever any of the States directly concerned has not provided a Commission or other authority" to enforce reasonable rates, "or such states are unable to agree through their properly constituted authorities * * * on the rates or charges of payment," jurisdiction is conferred upon the Federal Power Commission to regulate interstate electric rates. Respondent has contended (a) that this language divests the Federal Commission of power, once a State Commission is established, even over those subjects as to which the State Commissions are constitutionally impotent; and (b) in the alternative, that the language quoted is "congressional" permission overcoming any constitutional barrier to state action. The court below rejected the first contention, but accepted the second. Both, we believe, are demonstrably unsound.

(a) Although respondent's first argument may be said to find some support in the statute read literally, the court below termed it a "curious emasculation" (R. Vol. I, p. 674). Plainly, as the court declared, Congress intended that "there should be regulation and control of hydroelectrical energy and not that impotent public bodies would be set up by the states to go through the motions of regulation"; "the debates and reports indicate quite clearly that Congress" was not making "vain gestures" (R. Vol. I, p. 674). Other language in the statute, as well as its legislative history, demon-

strates that the law was not designed to make the authority of the Federal Commission dependent upon unconstitutional, and therefore futile, state proceedings. Cf. *United States* v. *Rosenblum Truck Lines, Inc.*, Nos. 52, 53, Oct. Term, 1941, decided Jan. 19, 1942, slip sheet p. 5; *United States* v. *American Trucking Associations,* 310 U. S. 534, 544; *United States* v. *Dickerson,* 310 U. S. 554, 561–562. Since the decision below is in accord with our position on this point, it is unnecessary to dwell upon it further in this petition.

(b) The respondent and the court below conceded that, under the *Kansas Gas* and *Attleboro* cases (p. 10, *supra*) in the silence of Congress the states lack power to regulate interstate wholesale utility rates. That this assumption was correct appears from the fact that Congress enacted the Federal Power Act in 1920 and reenacted it in 1935 with the doctrine for which these cases stand expressly in view.[8] But the Circuit Court of Appeals accepted respondent's argument that Section 20 contained an affirmative grant of authority to the states, and thus enlarged the

[8] The hearings on the bills which became the 1920 Act disclosed that Congressmen were inclined to believe that the rule precluding the states from fixing interstate railroad rates would be applicable to interstate power rates. Hearings Before the Committee on Water Power of the House of Representatives, 65th Cong., 2d sess., pp. 66–69, 102. The 1935 Act permitting federal regulation of all interstate wholesale rates was adopted for the express purpose of meeting the hiatus created by this Court's prior decisions.

power which they possessed while Congress was silent.

This conclusion is unwarranted either by the words of the statute or its history. The language, in the first place, is purely negative, and is not expressed in terms of grant. It thus differs from the other statutes cited by respondent in which Congress has expressly sanctioned the application of state power to interstate transactions,[7] as well as from the practice of Congress in giving express and formal approval to interstate compacts.[8]

The text of the statute is, we submit, more consistent with the view that Congress merely intended to leave untouched the jurisdiction which the states lawfully had and in substantial measure

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H. Rep. No. 1318, 74th Cong., 1st sess., pp. 7–8, 26–27; S. Rep. No. 621, 74th Cong., 1st sess., pp. 17–18, 48. These reports show that the 1935 Act was predicated on the assumption that the *Attleboro* case definitely negatived the power of the states over wholesale interstate rates. Since the question here is one of the intention of Congress, this assumption as to the scope of state constitutional power must be given effect. *Parker* v. *Motor Boat Sales, Inc.*, No. 46, this Term; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, No. 100, this Term.

[7] For cases discussing such statutes see *In re Rahrer*, 140 U. S. 545, 549, 562; *Whitfield* v. *Ohio*, 297 U. S. 431, 434, 440; Cf. *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311, 321, 332; *Ky. Whip & Collar Co.* v. *I. C. R. Co.*, 299 U. S. 334, 343, 351.

[8] E. g. *Olin* v. *Kitzmiller*, 259 U. S. 260, 262; *Arizona* v. *California*, 283 U. S. 423, 449; cf. *United States* v. *Arizona*, 295 U. S. 174, 183; see also Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717j (a).

were exercising over interstate retail rates at the time the Act was under consideration. Nothing in the legislative history preceding the passage of the original Act in 1920 suggests that anyone had in mind *expansion* of state power. The general remarks referred to by the court below (R. Vol. I, p. 675) are entirely consistent with the view that the states were to be permitted to exercise the power which they already possessed and nothing more. And there were repeated statements, supporting this interpretation, that the legislation did not divest the state commissions of any power[9] and that jurisdiction was to be "left" with, not given to, the state authorities.[10] Doubt was expressed as to the constitutional jurisdiction of the states, but no intention to enlarge it appears (58 Cong. Rec. 2239).

In 1929, after the *Kansas Gas* and *Attleboro* decisions, the Power Commission approved a formal opinion of its chief counsel that Section 20 permitted the Commission to regulate wholesale interstate rates irrespective of state action, inasmuch as the states lacked power over that subject. Ninth Annual Report of the Federal Power Commission to Congress (1929), pp. 89–90, 119–131. This opinion specifically states that Congress

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[9] Hearings before Committee on Water Power of the House of Representatives, 65th Cong., 2d Sess., p. 66.

[10] *Id.*, pp. 66, 99, 101. See also 58 Cong. Rec. 2239, 59 *id.* 6537.

had not, in Section 20, affirmatively granted consent to any state compacts. *Id.,* at pp. 128–129. This administrative interpretation was reported to Congress when made,[11] and also called to Congressional attention before Section 20 was reenacted in 1935.[12] This administrative construction in itself is entitled to weight, and the reenactment of the law without change after such interpretation was made known to the legislature is a strong indication that the reenacting Congress approved of it. Cf. *United States* v. *American Trucking Associations,* 310 U. S. 534, 549–550.[13]

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[11] The opinion was set forth in full in the Ninth Annual Report to Congress.

[12] See the statement of the Solicitor for the Federal Power Commission in Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess., p. 510.

[13] Many cases in this Court hold that reenactment of a statute manifests approval of prior administrative rulings even if they are not shown to have been called to the attention of the legislature. E. g. *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492; *Morgan* v. *Commissioner,* 309 U. S. 78, 81; *Helvering* v. *Winmill,* 305 U. S. 79, 83; *Old Mission Co.* v. *Helvering,* 293 U. S. 289, 293–294. Although secondary authorities have disagreed as to the weight to be given an administrative interpretation when there was no evidence that a reenacting Congress was aware of it, all agree that if the construction is known to the legislature reenacting the statute it should be given considerable weight. See Feller, *Addendum to the Regulations Problem,* 54 Harv. L. Rev. 1311, and articles cited; Griswold, *Postscriptum,* 54 Harv. L. Rev. 1323.

Any doubts as to the meaning of Section 20 when originally enacted are dispelled by the manifestation of Congressional understanding when the Federal Power Act was revised in 1935. Section 20 itself remained untouched. But the statements in the Committee Reports that the *Attleboro* case "placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the states" (S. Rep. No. 621, 74th Cong., 1st Sess., p. 17; *id.*, p. 48; H. Rept. No. 1318, 74th Cong., 1st Sess., pp. 7–8, 26–27) can hardly be reconciled with the notion that Congress had made the *Attleboro* doctrine inapplicable by its prior consent to state jurisdiction for federally licensed projects.[14] And even though the references to the *Attleboro* doctrine were in the portion of the Committee Reports describing Part II of the Act rather than Section 20, it is not reasonable to suppose that Congress intended the Commission to have less and the states more power over projects operating under federal licenses than over those which were not.

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[14] The representative of the state public utilities commissions admitted that the states had no constitutional power to regulate interstate wholesale rates, and urged the need for federal control of such rates. Hearings before the Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess., pp. 756–757; Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess., p. 1622.

CONCLUSION

It is important that this Court resolve all doubts as to the meaning of Section 20 and as to the respective powers of the Federal Power Commission and the state commissions over interstate electric rates. The decision below will defeat the intention of Congress that interstate wholesale rates of licensed projects be effectively regulated. For these reasons it is respectfully requested that this petition for a writ of certiorari be granted.

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Federal Power Commission.

FEBRUARY 1942.